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Supreme Court of the United States

OCTOBER TERM, 1968

No. 386

ALINE SWINFORD, *Petitioner,*

v.

ALLIED FINANCE COMPANY
OF CASA VIEW

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, DALLAS

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Aline Swinford, hereby petitions for a writ of certiorari to review the decision of the Court of Civil Appeals of Texas, Dallas, holding that failure or refusal of trial court to give her notice of hearing and entering summary judgment was harmless error.

OPINION BELOW

Petitioner would show this Honorable Court that the opinion delivered in the court below herein has been reported in the South Western Reporter, Second Series, Vol. 424 p. 298 (Appendix G. A-6-13).

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was made and entered on January 26, 1968. An order overruling a timely filed motion for rehearing was made and entered on February 16, 1968. An order dismissing a timely filed application for writ of error in the Supreme Court of Texas was made and entered on May 8, 1968; and an order overruling a timely filed motion for rehearing in said State Supreme Court was made and entered on May 29, 1968. This petition for writ of certiorari has been filed in this Court within ninety days thereafter.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether the Texas Rules of Civil Procedure, Rule No. 434, as construed and applied below, contravenes the due process of law provision of the Fourteenth Amendment to the United States Constitution.

2. Whether State court's action in proceeding to final judgment without notice is inconsistent with the due process clause of the Fourteenth Amendment to the United States Constitution, and

invalidates the proceedings, thereby requiring a new hearing.

CONSTITUTION AND RULES INVOLVED

Amendment XIV, United States Constitution, Section 1 (Appendix A. A-1); and Texas Rules of Civil Procedure, Rule No. 434 (Appendix F. A-5).

STATEMENT OF THE CASE

This petition involves a suit filed in the County Court at Law No. 3 of Dallas County, Texas, wherein respondent was seeking recovery of unpaid balance due on a promissory note and foreclosure of mortgage on the security for the same.

The debt sued on was created jointly with your petitioner and her former husband during their marriage. The borrowed money received therefrom was expended by the husband as manager of their community estate. Thereafter the husband was awarded a default judgment of divorce from the petitioner and ordered by the divorce court to pay the community debt theretofore created. The former husband married a different woman, and during his second marriage he continued to make monthly payments until on or about May 1966 he then defaulted. On or about October 1966 he filed a petition in bankruptcy with his new wife whereupon he listed for discharge the debt sued on herein below. Respondent thereafter sued the divorced wife, your petitioner, for recovery of the full amount of the unpaid balance due on the note.

Petitioner filed a plea in abatement

under the local special appearance rule (T.R.C.P. No. 120a; Appendix D. A-2), wherein she challenged the trial court's jurisdiction over her person and the subject matter involved. The trial court either failed or refused to serve her with notice that hearing had been set for the 3rd day of April 1967, and proceeded in her absence to consider the merits thereof on said date. The trial court overruled the said plea on said date, and rendered a final summary judgment against petitioner on the same date. Petitioner appealed to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, Dallas, assigning error complaining that trial court's failure to give her notice of the proceedings constituted an invasion of her constitutional right to due process and equal protection of the law as provided in the Constitution of the United States of America, Amendment 14, Section 1 (Appendix A. A-1). The said Court of Civil Appeals overruled petitioner's contention in this respect, holding that trial court's failure to give notice was "harmless error."

Petitioner would show this Honorable Court that the local rules of civil procedure (T.R.C.P. No. 324; Appendix E. A-3) do not require assignments of error to be filed in the State trial court to preserve errors committed in a trail to the court without benefit of jury. The federal question sought to be reviewed was properly presented at the first available opportunity in the proceedings by way of Eighth Point of Error in Appellant's Brief, timely filed in the said Court of Civil Appeals, reading as follows:

"The court's failure to give notice

of hearing and entering summary judgment is contrary to the Statutes of this State and such constitutes a fundamental error in violation of Art. 1, Sec. 19, of the Constitution of the State of Texas and the 14th Amendment, Section 1, of the Constitution of the United States of America." (R. 68).

The aforesaid Court of Civil Appeal's decision rendered thereon reads as follows:

"It is true that the judgment of the court does not affirmatively state that notice was given appellant prior to the hearing of the plea in abatement. We find it unnecessary to comment further upon the question of lack of notice of the hearing for the simple reason that even if we assume that the court was in error in failing to give notice of the hearing on the plea in abatement such error is not shown to have resulted in any harm or damage to appellant..... ...We have carefully considered all of appellant's points and find the same to be without merit and are overruled." (R. 98; Appendix G. A-12-13).

Petitioner again urged the same federal question by way of her timely filed motion for rehearing in said court, being Seventh and Eighteenth Points, reading as follows:

Seventh

"The Court of Civil Appeals erred in holding that the trial court's failure to give appellant notice of hearing on her plea in abatement was a harmless error (CCA Op. p. 5), because the same prevented her from presenting her special exceptions leveled at appellee's original

petition and pressing for a determination (CCA Op. p. 1), such action substantially prejudicing appellant." (R. 119).

Eighteenth

"The Court of Civil Appeals erred in overruling appellant's Eighth Point, reading as follows:

The court's failure to give notice of hearing and entering summary judgment is contrary to the Statutes of this State and such constitutes a fundamental error in violation of Art. 1, Sec. 19, of the Constitution of the State of Texas and the 14th Amendment, Section 1, of the Constitution of the United States of America." (R. 130).

The aforesaid State Court of Civil Appeals rendered a ruling thereon as follows:

"Overruled." (R. 141; Appendix H. A-13).

The two above rulings of the said State Court of Civil Appeals conclusively show that said court considered the federal question complained of, and decided the same against this petitioner.

Petitioner filed an application for writ of error in the Supreme Court of Texas, at Austin, in due time, wherein petitioner preserved for review the same federal question by way of Fifth Point of Error reading as follows:

"Such court erred in holding that cumulative errors were not contrary to Const., United States of America, Amendment 14, Section 1." (R. 164).

The said Supreme Court of Texas rendered its decision thereon as follows:

"Dismissed for want of jurisdiction" (R. 196; Appendix I. A-14).

Petitioner would show this Honorable Court that local State statutes (R.C.S. of Texas, Art. 1821(1); Appendix C. A-2) controlling the State Supreme Court's jurisdiction to review questions of law brought into issue from a State County Court provides that said State Supreme Court must find that there was a conflict in decisions rendered therein with another State Court of Civil Appeals, upon substantially the same state of facts, or that the construction or validity of a State statute was involved. The said State Supreme Court's ruling implies that neither of these required conditions were present in order to invoke its jurisdiction.

Petitioner filed her motion for rehearing in said court in due time wherein she again urged the same federal question reading as follows:

"This Honorable Court erred in not granting the application for writ of error on the Fifth Point of Error which reads:

Such court erred in holding that cumulative errors were not contrary to Const., United States of America, Amendment 14, Section 1." (R. 192).

The said State Supreme Court rendered a ruling thereon as follows:

"Overruled." (R. 196 ; Appendix J. A-14).

Petitioner says that the next above order by the State Supreme Court was the final ruling on petitioner's appellate

step of last resort in the State judiciary system, thus requiring petitioner to seek relief by way of this petition for writ of certiorari.

Petitioner would show this Honorable Court that the record of the courts below in this case is under the control of the Clerk, Court of Civil Appeals, Fifth District, Dallas County Courthouse, Dallas, Texas 75202.

POINT I

THE "HARMLESS ERROR" DOCTRINE PROVIDED BY TEXAS RULES OF CIVIL PROCEDURE, RULE NO. 434, APPLIED TO AN ERROR INVOLVING FAILURE OR REFUSAL TO GIVE REASONABLE NOTICE OF TRIAL COURT PROCEEDINGS CONFLICTS WITH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT. THIS PRESENTS A SUBSTANTIAL FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT.

We submit that the rule of the court denies petitioner her property without due process of the law, regardless of whether the Due Process Clause is interpreted by the "absorbtion" concept of the Bill of Rights, by means of an "absolute" right, or by way of protection of those rights that are "so rooted in the traditions and conscience of our people as to be ranked fundamental." The history of notice and fair play requirements in procedural due process show that they are "general rules established in our system of jurisprudence for the security of private rights." Hagar v. Reclamation District No. 108, 111 U.S. 701, 708. Such requirements are as old as civilized government and may not properly be defeated by State statute or State rules of

procedure. Therefore, a State rule which by its necessary operation is inhibited by the Fourteenth Amendment is invalid, regardless of the purpose for which it was adopted.

The problem posed by the "harmless error" rule of civil courts has been a continuing source of controversy when the error complained of involves a right guaranteed by the Fourteenth Amendment. We believe this problem should be reviewed here in order to remove the cloud that has consistently plagued litigants ever since the "harmless error" doctrine was adopted.

Should the rule below be left standing, the property rights and privileges of every defendant litigant will be fettered. They could be proceeded against and tried in absentia with the merits of the case determined after the fact. Such procedure is not only repugnant to our American way of life, but is reminiscent of Star Chamber proceedings which is contrary to the entire American theory of justice. See the trial of John Lilburn and John Warton (Star Chamber), 3 How. St. Tr. 1315 (1816). To proceed to summary judgment without notice to defendant informing her of the nature of the proceedings and when the matter had been set down for hearing denied defendant her day in court. To apply a rule of the court holding such procedure harmless is unheard of in American jurisprudence. Clearly the rule is arbitrary and unreasonable, and it leaves the door wide open to abuse.

Since the laws of the State of Texas are frequently a focal referent, it is

apparent that the rule applied below could result in irrepairable harm of immeasurable magnitude to litigants throughout the United States, and if permitted to stand, we have indeed reached a black day in our jurisprudential history by permitting the civil due process provisions of the United States Constitution to be completely defeated through application of the "harmless error" doctrine. Surely such consequence is of sufficient moment to warrant review by this Court.

We believe that this Court should consider this substantial fundamental federal constitutional question.

POINT II

FAILURE OR REFUSAL OF TRIAL COURT TO GIVE NOTICE, SO AS TO PERMIT DEFENDANT THE REASONABLE OPPORTUNITY TO APPEAR AND BE HEARD, IS A PALPABLE INVASION OF THE DUE PROCESS PROVISION OF THE FOURTEENTH AMENDMENT AS PREVIOUSLY CONSTRUED IN RELATED DECISIONS OF THIS COURT.

A Fortiori, procedural due process, either criminal or civil, requires reasonable notice of trial court hearings. Town of Walkerton v. New York, C & St. L.R. Co., 308 U.S. 556 (1939); Walker v. City of Hutchinson, 352 U.S. 112 (1956).

Your petitioner was divorced by an imprudent husband who left her virtually destitute with two minor children to support. The trial court below, in proceeding to summary judgment without notice and adjudging that she was personally liable for her former husband's failure to pay the debt, deprived her of her

property without being afforded the opportunity to submit evidence in support of her defense, and without benefit of argument by counsel at the hearing. We think it should shock the conscience of this Court to permit such decision to stand.

In considering the impact of the case at bar upon married women of community property states, we think it is significant to point out to this Court that the decision sought for review is the first case in the entire history of Texas holding that a married or divorced woman may be held personally liable for the full amount of a community debt created jointly with her husband. Such a land-mark precedent cannot help but affect millions of married women in all of our community property states. For over 120 years the State of Texas has authorized a wife to join her husband pro forma in creating a community debt as protection to her against abuse from drunken and worthless husbands. It is too much to expect her status to be changed overnight from that of a protected obligor to a principal obligor, and then be deprived of her property without notice of trial court proceedings. We do not believe that this Court can sanction such procedure, particularly when your petitioner's attorney of record, and his address, was recorded by the clerk of the trial court and was well known by the respondent's attorney of record.

The court below cites no case as authority to support its ruling in its opinion, and we have been unable to locate any prior U.S. Supreme Court case that condones depriving a citizen resident of

any State notice of court proceedings in at least one form or another. Moreover, it is apparent from the record below that the State Supreme Court refused to invoke its jurisdiction and decide the fundamental constitutional question that was twice properly presented therein. In view of these facts, all of which are supported by the record, it is also apparent that said State Supreme Court has sanctioned this obvious departure from accepted and usual course of judicial proceedings. We believe that such sanction, in itself, warrants this Court's exercise of its power of supervision below.

We believe that the discussion above demonstrates that the questions presented are so important to our system of justice as to require consideration by this Court. Consider too, that the refusal of the Supreme Court of Texas to invoke its jurisdiction and decide the federal questions raised forecloses any other State remedy available to petitioner to reopen the case.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

THOMAS P. BROWN III
1008 20th St., N.W.
Washington, D.C. 20005
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned attorney of record for petitioner hereby certifies that a true copy hereof was served upon all parties required to be served by depositing the same in the United States Post Office at Dallas, Texas, as prepaid first class certified mail, addressed to Mr. John D. Crawford of the firm of Locke, Purnell, Boren, Laney and Neely, 3600 Republic National Bank Tower, Dallas, Texas 75201, the attorneys for respondent, on the 5 day of August, 1968.

THOMAS P. BROWN III

APPENDIX "A"

Constitution of the United States of America, Amendment 14, Sec. 1, reading as follows:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX "B"

Title 28 United States Code, Sec. 1257(3), reading as follows:

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question, or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

APPENDIX "C"

Revised Civil Statutes of Texas, Article 1821(1), reading as follows:

"Art. 1821. (1591) (996) Judgment conclusive on law

Except as herein otherwise provided, the judgments of the Courts of Civil Appeals shall be conclusive on the law and facts, nor shall a writ of error be allowed thereto from the Supreme Court in the following cases, to wit:

1. Any civil case appealed from the County Court or from a District Court, when under the Constitution a County Court would have had original or appellate jurisdiction to try it, except in probate matters, and in cases involving the Revenue Laws of the State or the validity or construction of a Statute." (Vernon's Annotated Texas Civil Statutes, Vol. 4 p. 37).

APPENDIX "D"

Texas Rules of Civil Procedure, Rule No. 120a, reading as follows:

"Rule 120a. Special Appearance

1. Notwithstanding the provisions of Rules 121, 122, and 123, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to plea of privilege or any other plea, pleading or motion; provided, however, that a plea of privilege and any other plea, pleading, or motion may be

contained in the same instrument or filed subsequent thereto without waiver of such special appearance. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

2. Any motion to the jurisdiction provided for herein shall be heard and determined before a plea of privilege or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

3. If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State." (Vernon's Annotated Texas Rules of Civil Procedure, Vol. 1 p. 625).

APPENDIX "E"

Texas Rules of Civil Procedure, Rule No. 324, reading as follows:

"Rule 324. Prerequisites of Appeal

In all cases tried in the county or district court, where parties desire to appeal from a judgment of the trial court, a motion for new trial shall be

filed as a prerequisite to appeal; provided that neither a motion for new trial nor an assignment therein shall be a prerequisite to the right to complain on appeal of the action of the court in giving a peremptory instruction, or in withdrawing the case from the jury and rendering judgment, or in rendering or refusing to render judgment non obstante veredicto or notwithstanding the finding of the jury on one or more special issues, or in overruling a motion for judgment on the verdict made by the party who becomes appellant; nor shall a motion for new trial be required in a non-jury case or in a case where the appeal is based upon some error of the trial court arising after its action upon the motion for new trial. But motion for new trial shall be a necessary prerequisite to consideration of the complaints mentioned in Rule 325. When judgment is rendered non obstante veredicto or notwithstanding the finding of the jury on one or more special issues, the appellee may bring forward by cross-point contained in his brief filed in the Court of Civil Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been entered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of a jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel. In the event appellee assigns error by cross-point based upon an alleged improper argument of counsel, he shall support the same by proper bill of

exceptions. The failure to bring forward by cross-points such grounds as would vitiate the verdict shall be deemed a waiver thereof, save and except such grounds as require the taking of evidence in addition to that adduced upon the trial of the cause. A motion for new trial shall not be necessary in behalf of appellee where he does not complain of the judgment or a part thereof." (Vernon's Annotated Texas Rules of Civil Procedure, Vol. 3 pp. 489-490).

APPENDIX "F"

Texas Rules of Civil Procedure, Rule No. 434, reading as follows:

"Rule 434. If Judgment Reversed

When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial.

Provided, first, that no judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court; and if it appears to the court that the error affects a part

only of the matter in controversy, and the issues are severable, the judgment shall only be reversed and a new trial ordered as to that part affected by such error.

Provided, second, that if the erroneous action or failure or refusal of the trial judge to act shall prevent the proper presentation of a cause to the Court of Civil Appeals, and be such as may be corrected by the judge of the trial court, then the judgment shall not be reversed for such error, but the appellate court shall direct the said judge to correct the error, and thereafter the Court of Civil Appeals shall proceed as if such erroneous action or failure to act had not occurred." (Vernon's Annotated Texas Rules of Civil Procedure, Vol. 5 p. 3).

APPENDIX "G"

Judgment rendered by the Court of Civil Appeals for the Fifth Judicial District of Texas, at Dallas, reading as follows:

"Aline Swinford, Appellant v. Allied Finance Company of Casa View, Appellee, No. 17007, from County Court at Law No. 3 of Dallas County, Texas.

Allied Finance Company of Casa View brought this action against Aline Swinford and Weldon Glenn Swinford seeking judgment for the unpaid balance of a promissory note and also for the foreclosure of a chattel mortgage on certain personal property given as security for said note. The defendant Weldon Glenn Swinford was subsequently dismissed from the action. Defendant Aline Swinford filed her plea in abatement alleging the pendency of bankruptcy proceedings in the United States District Court for the Northern

District of Texas involving the same indebtedness and security. She also filed numerous special exceptions, followed by a general denial. Plaintiff filed its motion for summary judgment in due form and supported by proper affidavit. Defendant failed to appear and answer or otherwise controvert the summary judgment motion. Upon hearing, the trial court overruled the plea in abatement and sustained the motion for summary judgment. Aline Swinford appeals from such judgment. We affirm.

Appellant earnestly contends that the trial court was in error in rendering a summary judgment without considering and ruling upon appellant's special exceptions to appellee's pleading. It is true that appellant filed four special exceptions complaining of appellee's original petition, same presenting questions concerning the pendency of the bankruptcy proceedings, coverture of appellant, and lack of necessary party. However, the record is entirely silent and does not disclose that appellant at any time presented said exceptions to the trial court and secure the court's ruling thereon. Under such condition of the record we hold that all such special exceptions were waived.

This court, speaking through Mr. Justice Bateman, in Cook v. Jaynes, 366 S.W. 2d 646 (Tex.Civ.App., Dallas 1963), stated the rule:

"We make the same disposition of appellant's point that the summary judgment should not have been granted until appellant's special exceptions had been acted upon. We agree that the proper, orderly manner for trial courts to dispose of such matters is to pass on objections to pleadings before rendering

judgment, but there is nothing in this record to indicate that appellant called these exceptions to the trial court's attention or requested action thereon. If he did not do so, the exceptions were waived. Rule 90, Vernon's Texas R.C.P."

To the same effect see 3 Tex. Jur. 2d, Sec. 117, p. 386; 45 Tex. Jur. 2d, Sec. 187, p. 748; Wilson v. Clarke Floor Machine Co., 380 S.W. 2d 768 (Tex.Civ. App., Eastland 1964); and White v. Allstate Ins. Co., 386 S.W. 2d 601 (Tex.Civ. App., Beaumont 1965, writ ref'd n.r.e.).

We have examined each of the special exceptions and find that the same are without merit so that any possible error on the part of the court in failing to pass upon the same would be harmless. Rule 434, Vernon's Texas Rules of Civil Procedure.

Appellant next contends that the trial court erroneously granted summary judgment against her because of the dismissal of Weldon Glenn Swinford. This argument is based upon the proposition that at the time the note sued upon was executed by her she was the wife of Weldon Glenn Swinford; that subsequently they were divorced and in the decree of divorce it was adjudged that all community debts were to be paid by the husband, Weldon Glenn Swinford. She argues, therefore, that Weldon Glenn Swinford became the principal obligor upon the note sued upon and, perforce Art. 2088, Vernon's Ann. Civ. St. of Texas and Rule 163, T.R.C.P. the court could not properly dismiss him from the action. Appellant's contention cannot be sustained.

The only way we can ascertain the facts concerning the marital status of the parties as well as the divorce proceedings is from the certified copy of

the divorce decree attached to defendant's answer.

The note sued upon is standard in form and provides that the signers thereof were jointly and severally obligated to pay same. Both Aline Swinford and Weldon Glenn Swinford signed the note and thereby became joint obligors. Assuming the parties were man and wife at that time and were subsequently divorced and the judgment of the divorce court imposed liability upon the husband for the indebtedness, yet, such action could have no legal effect upon the rights of the holder and owner of the note. Appellee is not shown to have been a party to or had any notice of the divorce action or the judgment rendered therein. It is well settled that the rights of any owner in property, aside from the exempt property, are, in a very important sense, subordinate to the rights of his creditors. The court in a divorce action has no power to disturb the rights which creditors lawfully have against the parties. As stated in 3 Speer's Marital Rights in Texas , Sec. 840, p. 201:

"In truth, however, the partitioning of the community property is not a disposition of it at all. There is no change of owners, but a mere ascertainment and separtation of the interests theretofore exercised in common. It remains subject to the demands of creditors, and the wife receiving and appropriating property in the partition that would otherwise be liable to creditors, becomes personally liable, to the extent of the property so received, for the payment of the debts."

Since appellant was a principal obligor on the note she may be sued

either alone or jointly with Weldon Glenn Swinford, the other principal obligor, and it was not error for the court to dismiss one and allow recovery against the other. Art. 1986, V.A.C.S.; Shield v. First Coleman Nat. Bank of Coleman, 160 S.W. 2d 277 (Tex. Civ.App., Austin 1940, affirmed Sup. Ct. 1942, 140 Tex. 117, 166 S.W. 2d 688). Not being the only principal obligor on the note, Weldon Glenn Swinford was not an indispensable or necessary party to the action.

Appellant next contends that the original petition was fatally defective on its face and therefore summary judgment was improper. Appellant argues that it was fundamental error for the court to enter judgment upon the petition which failed to allege that appellant was not a feme covert at the time of execution of the note sued upon or that the contractual consideration was actually furnished for necessaries for herself, or her separate estate. By a 1963 amendment of Art. 4626, V.A.C.S., it is expressly provided that a married woman shall have the same powers and capacity as if she were a feme sole, in her own name, to contract and be contracted with, sue and be sued, and all her separate property, her personal earnings and the revenues from her separate estate which are not exempt from execution under the laws of Texas shall thereafter be subject to her debts and be liable therefor, and her contracts and obligations shall be binding on her. The Legislature, in 1963, also repealed Art. 4623 (House Bill 403, Ch. 472, p. 1188, Acts of 58th Legislature Regular Session) which dealt with property being subject to the payment of debts

contracted by the wife except those contracted for necessaries furnished her or her children. Therefore, when the note in question was executed by appellant in this case on January 27, 1965 she was subject to the amended law which imposed liability upon her as a feme sole.

Appellant's identical contention was advanced and rejected in Kitten v. Vaughn, 397 S.W. 2d 530 (Tex.Civ.App., Austin 1965).

Appellant's next contention, to the effect that the trial court, by entering summary judgment in this case, interfered with the bankruptcy proceedings in the United States District Court contrary to statute, is likewise without merit and must be overruled for several reasons. It is apparent from the information contained in the various special exceptions as well as the plea in abatement that appellant herself was not a party to the bankruptcy proceedings pending in the federal court. Weldon Glenn Swinford, the other principal obligor on the note sued upon, was a party to the bankruptcy proceedings. The property incorporated in the chattel mortgage sourght to be foreclosed in this action was listed by Weldon Glenn Swinford in the bankruptcy schedule.

It is settled law that a discharge in bankruptcy is personal to the bankrupt and does not have the effect of canceling or releasing the liability of a person jointly liable for a debt. 11 U.S.C.A., Sec. 34; Bradley v. Straus-Frank Co., 414 S.W. 2d 504 (Tex.Civ.App., Dallas 1967). Moreover, the record reveals that the bankruptcy court, acting through the trustee in bankruptcy,

specifically abandoned and disclaimed all right, title and interest to the assets involved in this lawsuit. In view of these facts, apparent in this record, no possible conflict of jurisdiction is apparent which would vitiate the action of the state court in proceeding to summary judgment.

In a number of points appellant complains of the action of the trial court in proceeding to hear her plea in abatement, and overruling same, without giving her notice of the hearing. It is true that the judgment of the court does not affirmatively state that notice was given appellant prior to the hearing of the plea in abatement. We find it unnecessary to comment further upon the question of lack of notice of the hearing for the simple reason that even if we assume that the court was in error in failing to give notice of the hearing on the plea in abatement such error is not shown to have resulted in any harm or damage to appellant. This for the reason that the plea in abatement, as above demonstrated, is without merit, as a matter of law.

Appellant's argument that the court erred in not giving her notice of the hearing of the summary judgment is without merit. The judgment itself recites due notice of the motion and setting thereon and also recites that such motion was not controverted.

The record in this case is abundantly clear that appellant had due notice of the motion for summary judgment and made no attempt to controvert such motion as provided by Rule 166-A, T.R.C.P. No question of due order of pleading is involved nor would appellant have waived or abandoned any rights

asserted by virtue of her plea in abatement and special exceptions had she proceeded to file controverting affidavit or other opposition to the motion. She elected to remain silent and not appear at the hearing. At such hearing the burden of proof was definitely upon appellee to establish the nonexistence of issuable facts. Appellee did this by introducing extrinsic evidence in support of its position thereby demonstrating its right to recover. Under such circumstances the judgment is proper. Gulbenkian v. Penn, 151 Tex. 412, 252 S.W. 2d 929 (1952); Gulf, C.&S.F. Ry. Co. v. McBride, 159 Tex. 442, 322 S.W. 2d 492 (1958); Sessions Co. v. W. A. Sheaffer Pen Co., 344 S.W. 2d 180 (Tex.Civ.App., Dallas 1961); Kuper v. Schmidt, 161 Tex. 189, 338 S.W. 2d 948 (1960); and Burnett v. Cory Corporation, 352 S.W. 2d 502 (Tex.Civ.App., Dallas 1961).

We have carefully considered all of appellant's points and find the same to be without merit and are overruled.

The judgment of the trial court is affirmed. Claude Williams, Associate Justice, Delivered January 26, 1968."

APPENDIX "H"

Notice of order overruling Motion for Rehearing reading as follows:

"Court of Civil Appeals, Fifth Supreme Judicial District, Dallas, Texas, February 16, 1968. You are hereby notified that, in the case of Aline Swinford v. Allied Finance Company of Casa View, our No. 17007, from Dallas County, the following decision and order was this day made and entered by this Court: Appellant's Motion for Rehearing was overruled as of this date. Respectfully Yours, Ed Buford, Clerk."

APPENDIX "I"

Notice of judgment dismissing Application for Writ of Error by the Supreme Court of Texas reading as follows:

"Clerks Office - Supreme Court, Austin, Texas, May 8, 1968. You are hereby notified that the Application for Writ of Error in the case of Swinford v. Allied Finance Co. of Casa View, No. B-788, was this day dismissed for want of jurisdiction. Very truly yours, Garson R. Jackson, Clerk."

APPENDIX "J"

Notice of order overruling Motion for Rehearing reading as follows:

"Clerks Office - Supreme Court, Austin, Texas, May 29, 1968. You are hereby notified that the Motion for Rehearing in the case of Swinford v. Allied Finance Co. of Casa View, No. B-788, was this day overruled. Very truly yours, Garson R. Jackson, Clerk."